No. 3--09--0365

Order filed January 6, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

CITY OF OTTAWA, ILLINOIS,	)	Petition for Review of an Order
	)	of the Illinois Labor Relations Board,
Petitioner,	)	State Panel.
	)	
v.	)	ILRB Nos. S--CA--04--193
	)	
THE ILLINOIS LABOR RELATIONS	)	
BOARD, STATE PANEL, and POLICEMEN'S	)	
BENEVOLENT LABOR COMMITTEE,	)	
	)	
Respondents.	)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Lytton concurred in part and dissented in part in the judgment.

ORDER

Held: The Board correctly determined that the Petitioner violated the Illinois Public Labor Relations Act when it denied a probationary employee's request for union representation during an interview of that employee. However, the Board abused its discretion in awarding the employee reinstatement and back pay as a remedy since the record was void of any indication that the employee was terminated for asserting his right to union representation.

Petitioner, City of Ottawa (City), seeks review of a final order of the State Panel of respondent Illinois Labor Relations Board (Board), in which the Board determined that the City

violated section 10(a)(1) of the Illinois Public Labor Relations Act (the Act) (5 ILCS 315/10 (a)(1) (West 2008)), when it denied probationary police officer Mark Manicki's requests for union representation during an interview by police investigators following an incident in which Manicki broke up a fight between two other police officers. Manicki's union, respondent Policemen's Benevolent Labor Committee (Union) filed an unfair labor practice charge with the Board alleging the City violated the Act by denying Manicki's request for union representation during the interview and then subsequently terminating his employment based, at least in part, on his responses during the interview.[1] The matter proceeded to a hearing before an Administrative Law Judge (ALJ) of the Board, who recommended that the charge be denied. The Board rejected the ALJ's recommendation, finding the City had violated section 10(a)(1) of the Act. As a remedy, the Board ordered the City to: (1) cease and desist from questioning Manicki and any of its other employees in a manner which violated their *Weingarten* rights; (2) post a notice to employees regarding the Board's decision; and (3) award Manicki reinstatement, back pay, lost benefits, and

[1] The right to union representation during an investigatory interview is referred to as a "*Weingarten*" right. *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975). The Board has accorded *Weingarten* rights to union represented employees of the state of Illinois under the Act. *Department of Central Management Services and Gerald Morgan*, 1 PERI 2020 (ISLRB 1985). However, no court has expressly affirmed the Board's finding that *Weingarten* rights apply. See *Ehlers v. Jackson County Sheriff's Merit Comm'n*, 183 Ill. 2d 83, 93 (1998) ("assuming *arguendo*, that [state employees] had *Weingarten*-type rights" those rights had been waived in this particular case).

expungement of his disciplinary record pursuant to section 11(c) of the Act (5 ILCS 315/11(c) (West 2008)). The City appealed the final order of the Board to this court.

FACTS

The following facts are taken primarily from the "Findings of Fact" section of the ALJ's "Recommended Decision and Order".

On October 21, 2003, police officers Brian Sember and Garry Johnson had a fight in the squad room of the City's police department in the presence of Mark Manicki. Manicki was a probationary officer and pulled Sember off Johnson during the fight. In so doing, Manicki either fell back onto a computer table or was shoved onto the table by Sember, thereby knocking off and damaging computer equipment. Upon hearing the commotion and crash of the equipment to the floor, other department personnel came into the squad room to calm the participants. Shift supervisors were then called to the scene. Shortly thereafter, Police Chief Brian Zeilmann requested a criminal investigation by the Illinois State Police.

After conducting interviews of Johnson, Sember, Manicki, and other department personnel, the State Police issued an investigative report that resulted in Sember being charged with criminal battery against Johnson. The entire report was provided to Chief Zeilmann, who then instructed two Ottawa police captains, Kenneth Kessinger and Paul Pitstick, to conduct an internal investigation into the incident involving Johnson and Sember. Zeilmann advised Kessinger and Pitstick that Manicki was a witness to the incident.

Kessinger and Pitstick began their investigation by issuing Johnson and Sember each a "Notice of Formal Investigation," ordering them to report for an interview "into the altercation between Gary Johnson, Brian Sember and Mark Manicki on the evening of October 21, 2003." The notice also advised Johnson and Sember of the specific misconduct they were each being

accused of and their right to counsel as well as union representation at the interview. The interviews of Johnson and Sember by Kessinger and Pitstick were conducted on November 13 and 14, 2003, at which both had legal counsel and/or union representation.

On November 15, 2003, Manicki was on duty when he was asked by Kessinger and Pitstick to join them in a conference room at department headquarters. Prior to this request, Manicki did not receive a "Notice of Formal Investigation" nor did he receive any indication from Kessinger or Pitstick that he was being investigated for any misconduct. Manicki was aware, however, of the notices given to Johnson and Sember, and he was also aware that each of those notices referred to "an altercation between Gary Johnson, Brian Sember and Mark Manicki." Manicki testified at the hearing that he was told by a sergeant that he (Manicki) was going to be disciplined for using too much force in separating Sember from Johnson. The ALJ noted, however, that there was no evidence in the record to establish how this sergeant knew of an alleged plan to discipline Manicki. Manicki also testified that he believed Captain Kessinger was a friend of Sember's, had an extreme dislike for Johnson, and would seek to discipline Manicki for supporting Johnson's version of what happened over Sember's.

When Manicki entered the conference room at Kessinger and Pitstick's request, Kessinger started a tape recorder and informed Manicki that "you're here as a witness in an internal department investigation, a matter which concerns another officer. A complaint has not been filed against you, and you're not under investigation in this matter. You understand that?" Manicki replied in the affirmative. Kessinger explained that the interview concerned the October 23, 2003, altercation between Sember and Johnson and then asked Manicki what he knew about what led up to that incident. At that point, Manicki requested union representation, at which the following colloquy took place:

"Kessinger: OK, at this time I want you to understand that you're here as a witness and that you are not being charged with any crime. You're not entitled to a union rep or an attorney.

Manicki: O.K.

Kessinger: You understand that?

Manicki: O.K. Well, I just, I was told not to speak about anything unless I had union representation.

Kessinger: Have you done anything wrong?

Manicki: No.

Kessinger: Have you violated federal, state, local law?

Manicki: No. No, I haven't.

Kessinger: Have you violated rules, regulations, departmental policy and procedure?

Manicki: Nope.

Kessinger: O.K. Then you're not entitled to a union rep and you're not entitled to legal counsel.

Manicki: O.K. If you say I'm not eligible for it then OK.

***

Kessinger: Just so we get this straight. You understand you're here as a witness.

Manicki: I understand I'm here as a witness.

Kessinger: There are no charges against you.

Manicki: But I'm just asking, I don't have a right to a union rep?

Kessinger: No you do not.

Manicki: Then we're perfectly clear then.

Kessinger: OK.

Manicki: OK. Not a problem."

Kessinger and Pitstick then questioned Manicki about events and statements leading up to the altercation between Sember and Johnson as well as the altercation itself. The questioning was detailed and included such matters as exactly what Johnson and Sember said to each other, how Johnson was seated, whether Johnson was pulled out of his chair by Sember, how far Sember's finger was from Johnson's face, whether Manicki could see if Johnson grabbed or twisted Sember's fingers or how many punches Sember threw at Johnson. The interview then turned to Manicki's actions in breaking up the fight, including questions concerning how much force Manicki exerted pulling Sember off Johnson, how Manicki ended up crashing into a computer table, whether Sember also landed on the table, and the physical and verbal exchange between Manicki and Sember immediately after Manicki landed on the table. At one point Kessinger specifically questioned Manicki's motives for his actions, but at no point did he accuse Manicki of any misconduct. Specifically, the ALJ noted the following conversation:

"Kessinger: Don't get us wrong here Mark. We're not here to accuse you of any wrong doing, you understand that.

Manicki: I understand that.

Kessinger: We're not trying to do that.

Manicki: Oh, I know. I understand. I just .....

Kessinger: We're here to try to get the facts and trying to get everything, you know make your memory work, and I know it's been a while since this happened, but we're trying to get your memory to work to make sure how things happened.

Manicki: That's exactly how it happened."

Kessinger testified that, after the Manicki's interview, he was of the opinion that Manicki had not violated any law, rule or department regulation. He based this opinion on the fact that Manicki's answers to Kessinger's questions were materially consistent with the answers and statements he had given to the state police investigators. It was only several weeks later, according to Kessinger, after he and Pitstick completed their investigation by interviewing other department personnel, including Douglas Wilkerson, a dispatcher on duty at the time of the incident, and re-interviewing Johnson, that Kessinger suspected that Manicki had lied to the state police investigators. There is nothing in the record to indicate that the interviews of Wilkerson and Johnson were the result of Manicki's interview.

Kessinger and Pitstick reported their conclusions to Chief Zeilmann. Included in their report was their conclusion that portions of Manicki's answers to their questions were fabricated or false in comparison to Johnson's second statement and Wilkerson's statement. They also concluded that certain statements Manicki made to the State Police, being the same as the statements he had given to them, were also fabricated or false. Kessinger and Ptistick informed Zeilmann of these conclusions. Following Kessinger's and Pitstick's report to Chief Zeilmann, Johnson received a 3-day suspension, and Sember was suspended for 6 days. Manicki received no discipline.

On January 6, 2004, approximately one week before Manicki's probationary period was to end, Chief Zeilmann recommended to the City's Board of Police and Fire Commissioners that Manicki's employment be terminated. In a letter to the Commissioners, Chief Zeilmann stated:

> "Upon your review of this documentation, I think that you will believe, as I do, that a vast portion of the statement as provided by Officer Mark Manicki, a probationary officer, has been purposely

> fabricated. You should agree that, although on opposing sides of the altercation, these portions of Officer Sember's and Johnson's statements are remarkably similar, usually differing only in point of view and are sometimes supported by other evidence. Officer Manicki's statement, however, veers drastically from the general event line that is followed by those of Johnson and Sember. ***
> It is my belief as well as that of the investigating officers that Officer Manicki's reasons behind this fabrication are mostly self-serving by attempting to place all of the blame on Officer Sember for the damaged equipment as well as trying to somehow justify the level of force used by him in this incident thus enhancing the case against Officer Sember. I would like to remind you to remember that Officer Manicki was interviewed as a witness and was ordered to be truthful in his answering of questions."

The ALJ also noted for the record that Chief Zeilmann also informed the Commissioners of four other incidents of allegedly deficient performance by Manicki during his probationary period. Included in this list was an observation that Manicki had been "cocky and arrogant" during the Kessinger/Pitstick interview. Chief Zeilmann testified, however, that none of these four incidents would have caused him to recommend Manicki's termination. After a half hour of closed session deliberation, the Commissioners announced their decision to terminate Manicki's employment.

As to whether the City violated the Act in denying Manicki's request for union representation, the ALJ noted that the Act grants a public employee the right to request union representation during an investigatory interview if the employee reasonably believes that the

interview might result in his or her discipline. The ALJ also noted that, in order to establish a violation of the Act, the union must show: (1) the meeting was investigatory; (2) the employee reasonably believes that disciplinary action may result from the interview; and (3) the employee requests union representation. Here, the ALJ found that the interview was investigatory and that Manicki had requested union representation. However, the ALJ found that the union failed to establish that Manicki reasonably believed that disciplinary action might result from the interview. The ALJ pointed to the repeated assurances by Kessinger and Pitstick that Manicki was not under investigation, and then rejected as mere speculation the argument that Kessinger was Sember's friend and hated Johnson and would seek to have Manicki disciplined for siding with Johnson against Sember. Thus, the ALJ recommended a finding that the Union had failed to establish a violation of the Act.

The Board rejected the ALJ's recommendation regarding the Union's failure to establish Manicki's reasonable belief that discipline might result from the interview. The Board viewed the evidence differently. It agreed with the ALJ's conclusion that the interview of Manicki was investigatory, that Manicki requested union representation, and that his request was denied. Unlike the ALJ, however, the Board found that Manicki had a reasonable belief that discipline might result from the interview. The Board noted that the standard in determining whether an employee reasonably expects discipline is an objective standard, measuring conduct in light of all circumstances. The Board found that a reasonable person in Manicki's position would believe that discipline might result from the interview. The Board pointed out that, while Manicki was not formally charged, the department considered him as "involved" in the damage to the table and computer equipment. The Board also noted that, as a probationary employee, Manicki would be particularly concerned that any policy violation on his part might lead to discipline. Accordingly,

the Board rejected the ALJ's recommendation and found that the City violated Manicki's right to union representation during the Kessinger/Pitstick interview. The Board held that a violation of the Act occurred, that Manicki's discharge was "predominantly dependent" upon information obtained in the unlawful interview, and that full reinstatement of Manicki with back pay was the appropriate for the violation.

The Board rejected two additional arguments raised by the City. First, the City argued that under the Illinois Uniform Police Officers Disciplinary Act (50 ILCS 725/1 et seq. (West 2008)) Manicki did not have a right to union representation in an investigatory interview. Second, the City argued that Manicki or the Union waived Manicki's statutory right to union representation.

Following his discharge by the City, Manicki sought administrative review of the Police and Fire Commissioner's decision to terminate his employment. The circuit court of La Salle County dismissed his petition for administrative review, and Manicki did not appeal that decision. Thereafter, Manicki filed a suit against Chief Zeilmann and the City, alleging civil rights violations. The district court dismissed Manicki's complaint based upon the doctrine of res judicata and that decision was affirmed on appeal. *Manicki v. Zeilmann, et al.*, 443 F. 3d 922 (7th Cir. 2006).

The record indicates that at the time of the hearing, and presumably to date, Manicki has been employed as a police officer in Ladd, Illinois.

The City raises several issues on appeal: (1) whether the doctrine of res judicata precluded the Board for deciding the matter of Manicki's rights under the Act; (2) whether the Board's finding that Manicki was entitled to union representation during the Kessinger/Pitstick interview was erroneous as a matter of law; (3) whether the Board's finding that neither Manicki nor the Union waived Manicki's right to union representation was clearly erroneous; (4) whether the Board's determination that Manicki's right to union representation was violated during the

Kessinger/Pitstick interview was clearly erroneous; and (5) whether the Board abused its discretion in ordering Manicki reinstated with full back pay as part of the remedy for the City's violation of the Act..

DISCUSSION

1. *Res Judicata*

The City argues that the entry of two prior judgments, one by the circuit court of La Salle County on the administrative review of the Police and Fire Commission's decision, and one by the federal district court on Manicki's civil rights claims against Chief Zeilmann and the City, were *res judicata* bars to the instant action. The issue of whether a subsequent claim is barred by the doctrine of *res judicata* is a matter of law, which is reviewed *de novo*. *Grchan v. Illinois State Labor Relations Board*, 315 Ill. App. 3d 459, 464-65 (2000).

Res judicata is an equitable doctrine that is designed to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Murneigh v. Gainer*, 177 Ill. 2d 287, 299 (1997). Under the doctrine, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same claim or cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). The doctrine of *res judicata* extends to those issues that could have been fully litigated in a former proceeding as well as those actually litigated. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). Res judicata is not a jurisdictional bar; rather, it is an affirmative defense, which can be waived or forfeited. *Village of Maywood Board of Fire and Police Commissioners v. Illinois Department of Human Rights*, 296 Ill. App. 3d 570, 578 (1998). When a litigant merely raises the doctrine of res judicata but does not put forth sufficient evidence to establish it, the

defense fails for want of proof. *P.I. & I. Motor Express Inc. v. Industrial Comm'n*, 368 Ill. App. 3d 230, 239 (2006).

Here, the appellees maintain that the City failed to adequately present its res judicata argument before the Board, and it has thus been forfeited on appeal. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 212-13 (2008) (argument, issue, or defense not presented in administrative hearing is defaulted and may not be raised on review). The appellees in the instant matter point out that the entire argument concerning *res judicata* before the Board were the following two statements in its brief to the Board: "The City has also asserted that the claim for reinstatement and back pay is barred by *res judicata*" and "summary judgment was rendered in favor of the City because the federal court found that Officer Manicki's first amendment claim should have been raised in his state court case and, as a result, the claim was barred by *res judicata*." Appellees maintain that the City failed to properly raise the issue of res judicata before the Board and the issue should be deemed forfeited before this court. We agree. We find that the two statements, unsupported by authority and without citation to the record before the Board, are insufficient to adequately present the issue of *res judicata*. We find, therefore, that the issue has been forfeited on appeal. *Cinkus*, 228 Ill. 2d at 213.

2. Uniform Peace Officers Disciplinary Act (UPODA)

The City next maintains that the Board erred in failing to follow the Uniform Peace Officers Disciplinary Act (UPODA) rather than the Act. Specifically, the City maintains that the UPODA requirements concerning legal counsel or union representation for uniform officers facing interrogation for disciplinary purposes supercedes any rights that officer may have under the Act. The Board disagreed. Whether a statute conflicts with or preempts another statute is a question of statutory interpretation and, hence, is a question of law subject to *de novo* review. *City of Decatur*

v. American Federation of State, County and Municipal Employees, Local 268, 122 Ill. 2d 353, 361-62 (1988).

Section 3.9 of the UPODA provides:

> "If a collective bargaining agreement requires the presence of representatives of the collective bargaining unit during investigations, such representatives shall be present during the interrogation, unless this requirement is waived by the officer being interrogated." 50 ILCS 725/3.9 (West 2008)).

The UPODA only applies to an officer's right to representation during an "interrogation" which the UPODA defines as "the questioning of an officer pursuant to the formal investigation procedures of the respective State agency of local governmental unit in connection with an alleged violation of such agency's or unit's rules which may be the basis for filing charges seeking his or her suspension, removal, or discharge." 50 ILCS 725/2 (West 2008). The Act, on the other hand, permits an employee to seek union representation during any investigatory interview. Thus, the Act applies to a much broader category of meetings than the UPODA.

Moreover, the UPODA was enacted prior to the Act, which contains a provision which states: "[i]n case of any conflict between the provisions of this Act and any other law *** relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated hereunder shall control." 5 ILCS 315/15 (West 2008). Employee disciplinary investigation and procedures constitute conditions of employment under the Act. *Town of Cicero v. Illinois Fraternal Order of Police Labor Council*, 301 Ill. App. 3d 323 (1998).

We therefore hold that the UPODA was not a bar to the Board's jurisdiction over the appellee's claim that the City violated the Act.

3. Waiver of Representation

The City next maintains that both the Union, by the terms of the collective bargaining agreement, and Manicki, by his conduct in the interview, waived his right to union representation and the Board erred in rejecting this argument. Whether the terms of a collective bargaining agreement waive an employee's rights is a question of law which is subject to *de novo* review. *Chicago Park District v. Illinois Labor Relations Board, Local Panel*, 354 Ill. App. 3d 595 (2004). Whether Manicki himself waived his right is a mixed question of law and fact subject to the clearly erroneous standard of review. *Cinkus*, 228 Ill. 2d at 211.

As to whether the collective bargaining agreement waived *Weingarten* rights, it is a well established principle of labor law that a contractual waiver of a statutory right must be specific, clear, unequivocal and unmistakable. *American Federation of State, County and Municipal Employees v. Illinois State Labor Relations Board*, 274 Ill. App. 3d 327, 334 (1995). Waiver is never presumed. *American Federation*, 274 Ill. App. 3d at 334.

Here, the collective bargaining agreement does not specifically mention a right to union representation during investigatory interviews. The City argues that this constitutes waiver. We disagree. A statutory right exists independent of a contract, and the statutory right remains unless the contract specifically waives the statutory right. *Elhers*, 183 Ill. 2d at 91. We hold therefore that the Board was correct as a matter of law in finding no waiver of Manicki's right to union representation in the contract.

As to whether Manicki's conduct in continuing to participate in the interview after his request for union representation was denied, the question involves the Board's interpretation of

both law and fact, and thus is subject to the "clearly erroneous" standard of review. *Cinkus*, 228 Ill. 2d at 211. Under the Board's interpretation of the Act, once an employee who has a *Weingarten* right asks for union representation, the ball is in the employer's court; and its options are to (1) dispense with or discontinue the interview; (2) offer the employee the choice of continuing the interview unaccompanied by union representation or having no interview at all to his side of the incident; or (3) accommodate the request. *Morgan and State of Illinois*, 1 PERI 2020 (Ill. SLRB 1985). Talking the employee out of asking for union representation is not one of the options the Board recognizes as available to the employer under the Act. Here, the Board determined that the only reason that Manicki continued the interview without union representation is that he was talked out of it by Kessinger. It did not find that he knowingly and voluntarily waived his right. Given the state of the record, we cannot say that the Board's conclusion was clearly erroneous.

4. *Weingarten* Violation

The City next maintains that the Board erred in finding that Manicki had a statutory right to union representation and that his right was violated. Whether a right exists under the Act and whether the facts and circumstances support a conclusion that the Act was violated is a mixed question of law and fact subject to the clearly erroneous standard of review. *Cinkus*, 228 Ill. 2d at 211. The City focuses its argument on whether the Board was correct in determining that Manicki need only have an "objectively" reasonable expectation that discipline might result from the Kessinger/Pitstick interview. The Board found Manicki's objective expectation was supported by the fact that he was considered an involved party, not just a witness, in the damage to the computer equipment, notwithstanding Kessinger's assurances to the contrary. Viewing the record, we cannot

say that the Board's determination that Manicki had an objectively reasonable expectation of discipline was clearly erroneous.

5. Remedy

The City's last argument is that, even if the Board was correct in finding a violation of the Act, it abused its discretion in awarding reinstatement and back pay to Manicki. The Act gives the Board discretion in determining an appropriate remedy for violations of the Act. 5 ILCS 315/11(c) (West 2008). A court of review will only interfere with an agency's exercise of its discretion where the agency has abused its discretion. *Cook County State's Attorney v. Illinois State Labor Relations Board, Local Panel*, 292 Ill. App. 3d 1, 6 (1997). An agency abuses its discretion when it renders its decision in an arbitrary and capricious manner. *Cook County State's Attorney*, 292 Ill. App. 3d at 6. A decision is arbitrary and capricious if it contravenes the intent of the Act, fails to consider a crucial aspect of the problem, or offers an explanation so implausible that it runs contrary to agency expertise. *Cook County State's Attorney*, 292 Ill. App. 3d at 6.

We agree with the City. By the Board's own precedent, make-whole relief is appropriate only where: (1) an employer takes an adverse action against an employee in retaliation for asserting his right to union representation; or (2) an employer's decision to discharge or discipline was "predominantly dependent" upon information obtained through the unlawful interview. *Teamsters, Local 714 and City of Highland Park*, 15 PERI 2004 (IL SLRB 1999).

Here, the Board found that the City's decision to discharge Manicki was "predominantly dependent" upon the information elicited from him in the Kessinger/Pitstick interview. The City argues that this conclusion is arbitrary and capricious in that it fails to consider crucial uncontested facts and is otherwise implausible. The City points out that there was uncontroverted testimony from Chief Zeilmann that the answers Manicki gave to the State Police were identical to the

answers he gave to Kessinger and Pitstick in their interview. There was also uncontroverted testimony from Chief Zeilmann that he would have recommended Manicki's termination even if the Kessinger/Pitstick interview had never taken place. He would have recommended that Manicki be terminated based solely upon his conclusion that Manicki lied to the State Police. Moreover, the record shows that it was not Manicki's answers in the Kessinger/Pitstick interview that caused Chief Zeilmann to question Manicki's truthfulness, but rather the information garnered in the second interview of Johnson and the interview of Wilkerson.

We begin with the fact that Manicki was a probationary employee. His probationary employment was determined by the Ottawa Board of Police and Fire Commissioners to have been unsuccessful. It is well settled that a probationary police officer's employment may be terminated for any reason, that he has no entitlement to continued employment during his probationary period, nor is a probationary officer entitled to a determination of just cause for discharge. *Romaniski v. Board of Fire & Police Commissioners*, 61 Ill. 2d 422, 425 (1975); *Ragon v. Daughters*, 239 Ill. App. 3d 533, 535 (1992). Since Manicki could have been summarily dismissed without the need for the employer to justify his termination, the Labor Board had no basis upon which to determine that Manicki's discharge was "predominantly dependent" upon the answers he gave during the Kessinger/Pitstick interview. Simply put, as a probationary officer, Manicki's employment could be summarily terminated without cause, thus his termination was not "dependent" upon anything. Therefore, the Labor Board's finding that his termination was "predominantly dependent" upon his answers in the Kessinger/Pitstick interview Manicki's is completely contrary to the record.

The partial dissent correctly points out that probationary employees may not have their employment terminated for pursuing a constitutional or statutory right. See Teal v. City of Chicago, 986 F. Supp. 1098 (N.D. Ill. 1997) (probationary police officer could not be fired for his

age pursuant to the Age Discrimination in Employment Act); *Zientara v. Long Creek Township*, 211 Ill App. 3d 226 (1991) (probationary employee may not be discharged for exercising his constitutional right to freedom of expression); *Speed Dist. 802 v. Warning*, 392 Ill. App. 3d 628 (2009) (probationary teacher entitled to reinstatement where she was fired in violation of the Illinois Educational Labor Relations Act for asserting rights to union representation). However, in the instant case, unlike the cases cited by the partial dissent, nothing in this record supports a conclusion or even an inference that Manicki's employment was terminated for asserting his right to union representation. As we have discussed previously, the record clearly established that, while Manick's right to union representation was violated, his invocation of that right had nothing to do with the decision to terminate his probationary employment, and the Board's finding that it did was clearly an abuse of discretion.

We thus find that the Board's order of reinstatement and back pay to Manicki was an abuse of discretion. Having found that the City violated the Act by denying Manicki's request for union representation, the Board entered a cease and desist order against the City, and further ordered that its written decision be prominently posted where all union employees could see it. This remedy is sufficient to protect the interests of the Union and employees in the City's future compliance with the Act. Ordering make-whole relief for Manicki who was a probationary employee and could be terminated for any reason regardless of whether it has been proven that the information obtained in the unlawful interview was a predominant factor in Manicki's discharge contravenes the intent of the Act. Thus, the Board abused its discretion in awarding Manicki make-whole relief.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Board's finding that Manicki's rights under the Act were violated by the City, we reverse that portion of the Board's order

awarding make-whole remedy, and we remand this matter to the Board to issue a decision consistent with this disposition.

Affirmed in part; reversed in part; remanded with direction.

JUSTICE LYTTON, concurring in part and dissenting in part.

I concur with the majority's conclusion that the City violated section 10(a)(1) of the Act by denying Manicki's requests for union representation during his interview with police investigators. However, I dissent from the majority's conclusion that the Board's order granting Manicki reinstatement and back pay was an abuse of discretion.

Section 11 of the Act provides that when a party has committed an unfair labor practice, the Board shall issue "an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action, including reinstatement of the public employees with or without back pay, as will effectuate the policies of this Act." 5 ILCS 315/11(c) (West 2008). This statutory grant of power permits the Board to fashion a remedy that will make the charging party whole. *Sheriff of Jackson County v. Illinois State Labor Relations Board*, 302 Ill. App. 3d 411, 416, 705 N.E.2d 924, 927 (1999).

The majority holds that Manicki was not entitled to relief from the City's unfair labor practice because he was a probationary employee. However, this is not the law in Illinois. "The courts of this State have recognized the rights of probationary employees not to be discharged except according to the law." *Alberty v. Daniel*, 25 Ill. App. 3d 291, 296, 323 N.E.2d 110, 114 (1974). While an employer may fire a probationary employee for any legal reason, an employer is prohibited from doing so unlawfully. *Messina v. City of Chicago*, 145 Ill. App. 3d 549, 556, 495 N.E.2d 1228, 1232 (1986).

Courts in this state have uniformly held that an employer may not discharge a probationary employee in violation of the constitution, or a statute or regulation. See *Johnson v. Ogilvie*, 47 Ill. 2d

506, 266 N.E.2d 338 (1970) (discharge of probationary employees in contravention of Political Activity Act); *Teall v. City of Chicago*, 986 F.Supp. 1098 (N.D. Ill. 1997) (probationary police officer could not be fired for his age pursuant to the Age Discrimination in Employment Act); *Zientara v. Long Creek Township*, 211 Ill. App. 3d 226, 569 N.E.2d 1299 (1991) (probationary employee may not be discharged for exercising her constitutional right to freedom of expression); *Fernandes v. Margolis*, 201 Ill. App. 3d 47, 558 N.E.2d 699 (1990) (probationary trooper's discharge did not comply with regulations issued by the Illinois Department of State Police); *Village of Bellwood Board of Fire & Police Comm'ners v. Human Rights Comm'n*, 184 Ill. App. 3d 339, 541 N.E.2d 1248 (1989) (probationary police officer's discharge was a civil rights violation prohibited by the Human Rights Act); *Abex Corp. v. Illinois Fair Employment Practices Comm'n*, 49 Ill. App. 3d 469, 364 N.E.2d 495 (1977) (probationary employee's termination was racially discriminatory, thus violating the Fair Employment Practices Act); *Alberty*, 25 Ill. App. 3d 291, 323 N.E.2d 110 (probationary employee could not be fired in violation of civil rights granted by the Federal Civil Rights Act of 1871).

Probationary employees who are discharged in violation of the law are entitled to reinstatement. See *Mt. Helathy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977) (probationary employee entitled to reinstatement where discharge was the result of employee exercising his First Amendment rights); *Speed Dist. 802 v. Warning*, 392 Ill. App. 3d 628, 911 N.E.2d 425 (2009) (probationary teacher entitled to reinstatement where she was fired in violation of the Illinois Educational Labor Relations Act for asserting rights to union representation); *Farmer v. McClure*, 172 Ill. App. 3d 246, 526 N.E.2d 486 (1988) (probationary employee entitled to reinstatement where his termination did not comply with employer's administrative rules); *Sutherland v. National Labor Relations Board*, 646 F.2d 1273 (8th Cir. 1981) (probationary employee discharged

for engaging in concerted activity in violation of the National Labor Relations Act entitled to reinstatement).

The majority cites two cases for the general principle that probationary employees may be terminated for any reason. However, this general principle cannot and does not apply when that reason violates a statute or the constitution. See *Alberty*, 25 Ill. App. 3d at 296, 323 N.E.2d at 114.[2]

Here, the majority found that the City's actions in denying Manicki representation during the police investigation violated *Weingarten* and the Illinois Public Labor Relations Act. Nevertheless, the majority denied Manicki make-whole relief, including reinstatement, because he was a probationary employee. Manicki's status as a probationary employee does not make him ineligible for reinstatement. See *Warning*, 392 Ill. App. 3d at 639-40, 911 N.E.2d at 435-36; *Sutherland*, 646 F.2d at 1275. I would affirm the Board's order granting Manicki reinstatement.

[2] Despite the majority's assertion to the contrary, there is no requirement that a probationary employee be pursuing a legal right in order for his termination to be unlawful. An employer's termination of a probationary employee is unlawful if it violates a law. See *Alberty*, 25 Ill. App. 3d at 296, *Messina*, 145 Ill. App. 3d at 556. A violation of the law occurs when an employer terminates an employee (1) in retaliation for asserting his right to union representation, or (2) based on information obtained through an interview that violates an employee's *Weingarten* rights. *Teamsters, Local 714 and City of Highland Park*, 15 PERI ¶2004 (ISLRB 1999).